

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-05470 CW

SAFEWAY INC.; WALGREEN CO.; THE
KROGER CO.; NEW ALBERTSON'S, INC.;
AMERICAN SALES COMPANY, INC.; and HEB
GROCERY COMPANY, LP,

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANT
ABBOTT LABORATORIES'
MOTIONS FOR SUMMARY
JUDGMENT ON DIRECT
PURCHASERS' CLAIMS
(Docket No. 232) AND
ON GSK'S CLAIMS
(Docket No. 227)

Plaintiffs,

V.

ABBOTT LABORATORIES.

Defendant.

No. C 07-05985 CW

MEIJER, INC. & MEIJER DISTRIBUTION,
INC.; ROCHESTER DRUG CO-OPERATIVE,
INC.; and LOUISIANA WHOLESALE DRUG
COMPANY, INC., on behalf of
themselves and all others similarly
situated.

(Docket Nos. 332 and
328)

Plaintiffs.

V.

ABBOTT LABORATORIES

Defendant.

No. C 07-06120 CW

RITE AID CORPORATION; RITE AID HQTRS CORP.; JCG (PJC) USA, LLC; MAXI DRUG, INC. D/B/A BROOKS PHARMACY; ECKERD CORPORATION; CVS PHARMACY, INC.; and CAREMARK LLC,

(Docket Nos. 213 and
209)

Plaintiffs,

V.

ABBOTT LABORATORIES.

Defendant.

1 SMITHKLINE BEECHAM CORPORATION, d/b/a
GLAXOSMITHKLINE,

No. C 07-05702 CW

3 Plaintiff,

(Docket Nos. 287 and
283)

4 | v.

5 ABBOTT LABORATORIES,

6 || Defendant.

8 Defendant Abbott Laboratories moves for summary judgment or,
9 alternatively, summary adjudication on the claims of Direct
10 Purchaser Plaintiffs Safeway, Inc., et al.; Meijer, Inc., et al.;
11 and Rite Aid Corporation, et al. (collectively, Direct Purchasers)
12 and for summary judgment on Plaintiff GlaxoSmithKline's (GSK)
13 claims. Direct Purchasers and GSK oppose Abbott's motions. The
14 motions were heard on October 28, 2010. Having considered oral
15 argument and the papers submitted by the parties, the Court GRANTS
16 Abbott's motions in part and DENIES them in part.

BACKGROUND

18 || I. Abbott's Pricing of Norvir

19 Protease inhibitors (PIs) are considered the most potent class
20 of drugs to combat the HIV virus. In 1996, Abbott introduced
21 Norvir as a stand-alone PI with a daily recommended dose of 1,200
22 milligrams (twelve 100-mg capsules a day), priced at approximately
23 eighteen dollars per day. Norvir is the brand name for a patented
24 compound called ritonavir.

After Norvir's release, it was discovered that, when used in small quantities with another PI, Norvir would "boost" the anti-viral properties of that PI. Not only did a small dose of Norvir -- about 100 to 400 milligrams per day -- make other PIs more

1 effective and decrease the side effects associated with high doses,
2 but it also slowed the rate at which HIV developed resistance to
3 the effects of those PIs. The use of Norvir as a "booster" has
4 enabled HIV patients to live longer. But the use of Norvir as a
5 booster, and not a stand-alone PI, has also meant that the price
6 for an average daily dose of Norvir has plummeted since Norvir was
7 first introduced, because patients need a much smaller daily dose
8 of Norvir when it is used as a booster compared to when it is used
9 as a stand-alone PI. By 2003, the average price for a daily dose
10 of Norvir was \$1.71.

11 In 2000, Abbott introduced Kaletra, a single "soft gel
12 capsule" containing the PI lopinavir as well as ritonavir, used to
13 boost the effects of lopinavir. Calamari Decl. ¶ 15. A single
14 capsule contained 133 milligrams of lopinavir and 33 milligrams of
15 ritonavir.

16 In 2003, two new PIs, Bristol-Myers Squibb's Reyataz and GSK's
17 Lexiva, were introduced to the market. Although both drugs could
18 be prescribed as stand-alone PIs, their daily doses were less if
19 they were administered along with Norvir. A daily dose of Reyataz,
20 unboosted by Norvir, was 400 milligrams; if boosted by 100
21 milligrams of Norvir, Reyataz's daily dose was 300 milligrams. A
22 daily, unboosted dose of Lexiva was 2,800 milligrams; if taken with
23 100 or 200 milligrams of Norvir, Lexiva's daily dose was 1,400
24 milligrams. Abbott was aware of studies that showed Norvir-boosted
25 doses of Reyataz and Lexiva had efficacy similar to Kaletra and, in
26 several ways, were superior to Kaletra. See Stockinger Decl., Ex.
27 98, at NOR00096554-55. Without a boosting dose of Norvir, however,
28 these drugs were inferior to Kaletra.

1 After the introduction of Reyataz, Kaletra's market share
2 fell. The average daily dose of Norvir also fell. Before
3 Reyataz's release, the most common boosting dose of Norvir ranged
4 from 200 milligrams to 400 milligrams a day. Clinical trials,
5 however, showed that a Norvir dose of only 100 milligrams a day
6 effectively boosted Reyataz.

7 By September, 2003, Abbott was aware that Reyataz and Lexiva
8 would threaten Kaletra's future market share and cause it to lose
9 revenue. Abbott considered three options to preserve its "HIV
10 leadership in the PI class": (1) continue to execute licensing
11 agreements with competitors for the co-marketing of their PIs along
12 with Norvir, similar to the one Abbott and GSK agreed to in
13 December, 2002, see generally Calamari Decl., Ex. 23 at NOR0004414;
14 (2) remove Norvir from the market; or (3) increase the price of
15 Norvir. See Stockinger Decl., Ex. 17 at RIT0437434. Abbott
16 concluded that the first would not be sufficient to stem projected
17 revenue losses and that the second would cause "significant
18 issues . . . on PR and regulatory fronts both domestically and
19 internationally." Id. Abbott's staff ultimately decided to
20 recommend an increase in the price of Norvir. See Stockinger
21 Decl., Ex. 95, at NOR00091874. Abbott CEO Miles White approved the
22 increase in late October, 2003.

23 On December 3, 2003, Abbott raised the price of 100 milligrams
24 of Norvir from \$1.71 to \$8.57, which amounted to a 400-percent
25 increase. In contrast, Abbott's four previous price increases
26 averaged 3.45 percent, which was in line with the rate of
27 inflation. Stockinger Decl., Ex. 71, at NOR00112052. The change
28 applied only to consumers with private insurance; those purchasing

1 Norvir through public programs, such as Medicare, were not subject
2 to it because of government pricing rules. Abbott maintained the
3 cost of a daily regimen of Kaletra at \$18.78. The Norvir price
4 hike commensurately increased the price of boosted Reyataz and
5 Lexiva therapies: a daily dose of Reyataz and Norvir rose from
6 \$23.79 to \$30.65, and a daily dose of Lexiva and Norvir jumped from
7 \$19.42 to \$33.14.¹ See Calamari Decl., Ex. 2, at NOR00302683;
8 Dellinger Decl., Ex. 103 ¶ 10.

9 Since December, 2003, Norvir's price has remained at \$8.57 per
10 100 milligrams, whereas the prices for boosted PIs have risen. In
11 December, 2003, the price of a daily dose of Kaletra was \$18.78.
12 After slightly reducing Kaletra's price to \$18.76 in 2004, through
13 four price hikes between June, 2005 and December, 2007, Abbott
14 increased Kaletra's price to \$23.40, a rise of approximately
15 twenty-five percent. Between June, 2005 and December, 2007, the
16 cost of a daily dose of Reyataz, not including Norvir, increased
17 approximately eleven percent, from \$23.14 to \$25.76. And the cost
18 for a daily dose of Lexiva, not including Norvir, increased
19 approximately twenty-two percent over the same period, from \$16.78

¹ Abbott's comparison of the price of daily doses of Norvir and Kaletra and "average daily boosted doses" of other PIs, such as Reyataz, Lexiva and Prezista, is misleading. See Calamari Decl. ¶ 44 and tbl.1. What is relevant is the cost of therapies based on Reyataz, Lexiva and Prezista, not these drugs' individual prices. For instance, in December, 2003, Abbott compares the price of Reyataz, which was \$22.08, to the price of Kaletra, which was \$18.78. This comparison suggests that a Reyataz-based therapy cost eighteen percent more than one based on Kaletra. However, the price of Reyataz does not include the price of Norvir, which Abbott acknowledges is required to be taken if Reyataz serves as a boosted PI. With Norvir's price included, the cost of a Reyataz-based therapy, which required only 100 milligrams of Norvir, jumps to \$30.65, or sixty-three percent above the cost to take Kaletra. The increase in the price of a Lexiva-based therapy, which required 200 milligrams of Norvir, was all the more substantial.

1 to \$20.40. See Calamari Decl. ¶¶ 45-46, tbl.1.

2 At the time of the Norvir price increase, Kaletra commanded a
3 substantial share of the boosted PI market. Since then, its share
4 has declined. In comparison, the market shares of Reyataz and
5 Lexiva have increased, along with that of Prezista, a boosted PI
6 introduced in June, 2006.

7 II. Plaintiffs' Complaints and Procedural History

8 Direct Purchasers allege that, in violation of Section 2 of
9 the Sherman Act, Abbott monopolized or attempted to monopolize the
10 "boosted market," which Plaintiffs define to be the market in which
11 Kaletra competes with Reyataz, Lexiva and other PIs boosted by
12 Norvir. Specifically, Direct Purchasers complain that Abbott set
13 predatory prices for Kaletra, which they argue is a bundled
14 product, and violated its antitrust duty to deal with respect to
15 Norvir. Direct Purchasers also allege that Abbott monopolized the
16 "boosting market," which Plaintiffs define to be a market in which
17 Norvir is the only product. In the Meijer action, the Court has
18 certified a class of:

19 All persons or entities in the United States that
20 purchased Norvir and/or Kaletra directly from Abbott or
any of its divisions, subsidiaries, predecessors, or
affiliates during the period from December 3, 2003
21 through such time as the effects of Abbott's illegal
conduct have ceased, and excluding federal governmental
22 entities, Abbott, and Abbott's divisions, subsidiaries,
predecessors, and affiliates.
23

Order of August 27, 2008 at 21, Meijer v. Abbott Laboratories, Case
24 No. 07-5985 CW.
25

GSK also alleges that Abbott monopolized or attempted to
26 monopolize the boosted market, in violation of Section 2.
27 Specifically, GSK claims that Abbott violated its antitrust duty to
28

1 deal with respect to Norvir and sabotaged its competitors. In
2 addition, GSK brings claims under New York law for breach of the
3 implied covenant of good faith and fair dealing related to its co-
4 marketing licensing agreement with Abbott. Finally, GSK pleads
5 claims for violations of North Carolina's Unfair and Deceptive
6 Trade Practices Act (UDTPA), N.C. Gen. Stat. §§ 75-1.1, et seq.
7 The UDTPA, among other things, prohibits monopolization and
8 attempted monopolization. Id. § 75-2.1.

9 The current cases are related to John Doe 1 v. Abbott
10 Laboratories, No. C 04-1511 CW. Although that case also concerned
11 the December, 2003 increase in Norvir's price, the Doe plaintiffs
12 based their Section 2 claim on a theory of monopoly leveraging.
13 See John Doe 1 v. Abbott Laboratories, 571 F.3d 930, 933 (9th Cir.
14 2009). The Ninth Circuit held that the plaintiffs' stand-alone
15 monopoly leveraging claim was foreclosed by Pacific Bell Telephone
16 Co. v. linkLine Communications, Inc., ____ U.S. ___, 129 S. Ct. 1109
17 (2009). The Ninth Circuit noted that the Doe plaintiffs did not
18 allege predatory pricing or a refusal to deal. Doe, 571 F.3d at
19 935. Allegations of such conduct are plead here.

20 In its motion to dismiss, Abbott argued that the Ninth
21 Circuit's decision in Doe controlled the outcome of this case and
22 foreclosed relief on Plaintiffs' claims. The Court denied Abbott's
23 motion, concluding that Doe was distinguishable because Plaintiffs
24 here alleged predatory pricing and a refusal to deal. Abbott then
25 filed a motion to certify issues for interlocutory appeal, which
26 the Court denied. Thereafter, Abbott petitioned the Ninth Circuit
27 for a writ of mandamus, seeking enforcement of its mandate in Doe.
28 The Ninth Circuit denied Abbott's petition on September 28, 2010.

In a footnote in its opposition to Abbott's motion for summary judgment, GSK asserted that the motion did not address two theories of antitrust liability it had raised in opposition to Abbott's motion to dismiss: (1) under the circumstances of this case, it could still sue under Section 2 on a "monopoly leveraging plus" theory, notwithstanding linkLine and the Ninth Circuit's decision in Doe; and (2) Abbott's conduct was analogous to the tortious acts held to violate Section 2 in Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002). GSK also asserted in the footnote that, if Direct Purchasers survived summary judgment on their predatory pricing claim under Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008), it should also be entitled to go to trial on its "equally efficient competitor test." GSK Opp'n 18 n.18. At the October 28, 2010 hearing on Abbott's motions, the Court allowed further briefing from GSK and Abbott regarding the assertions in GSK's footnote.

LEGAL STANDARD

18 Summary judgment is properly granted when no genuine and
19 disputed issues of material fact remain, and when, viewing the
20 evidence most favorably to the non-moving party, the movant is
21 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
22 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
23 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
24 1987).

25 The moving party bears the burden of showing that there is no
26 material factual dispute. Therefore, the court must regard as true
27 the opposing party's evidence, if supported by affidavits or other
28 evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815

1 F.2d at 1289. The court must draw all reasonable inferences in
2 favor of the party against whom summary judgment is sought.
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
4 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
5 1551, 1558 (9th Cir. 1991).

6 Material facts which would preclude entry of summary judgment
7 are those which, under applicable substantive law, may affect the
8 outcome of the case. The substantive law will identify which facts
9 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
10 (1986).

11 Where the moving party does not bear the burden of proof on an
12 issue at trial, the moving party may discharge its burden of
13 production by either of two methods:

14 The moving party may produce evidence negating an
15 essential element of the nonmoving party's case, or,
16 after suitable discovery, the moving party may show that
17 the nonmoving party does not have enough evidence of an
essential element of its claim or defense to carry its
ultimate burden of persuasion at trial.

18 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
19 1099, 1106 (9th Cir. 2000).

20 If the moving party discharges its burden by showing an
absence of evidence to support an essential element of a claim or
21 defense, it is not required to produce evidence showing the absence
of a material fact on such issues, or to support its motion with
22 evidence negating the non-moving party's claim. Id.; see also
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
23 moving party shows an absence of evidence to support the non-moving
party's case, the burden then shifts to the non-moving party to
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1 produce "specific evidence, through affidavits or admissible
2 discovery material, to show that the dispute exists." Bhan, 929
3 F.2d at 1409.

4 If the moving party discharges its burden by negating an
5 essential element of the non-moving party's claim or defense, it
6 must produce affirmative evidence of such negation. Nissan, 210
7 F.3d at 1105. If the moving party produces such evidence, the
8 burden then shifts to the non-moving party to produce specific
9 evidence to show that a dispute of material fact exists. Id.

10 If the moving party does not meet its initial burden of
11 production by either method, the non-moving party is under no
12 obligation to offer any evidence in support of its opposition. Id.
13 This is true even though the non-moving party bears the ultimate
14 burden of persuasion at trial. Id. at 1107.

15 DISCUSSION

16 I. Sherman Act Claims for Monopolization and Attempted
17 Monopolization of the Boosted Market

18 Section 2 of the Sherman Act "makes it unlawful to monopolize,
19 or attempt to monopolize, . . . any part of the trade or commerce
20 among the several States." linkLine, 129 S. Ct. at 1118. To
21 establish liability for a monopolization claim, a plaintiff must
22 demonstrate "(1) the possession of monopoly power in the relevant
23 market and (2) the willful acquisition or maintenance of that power
24 as distinguished from growth or development as a consequence of a
25 superior product, business acumen, or historic accident." Eastman
26 Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 480 (1992).
27 To prove attempted monopolization, a plaintiff must show "'(1) that
28 the defendant has engaged in predatory or anticompetitive conduct

1 with (2) a specific intent to monopolize and (3) a dangerous
2 probability of achieving monopoly power.'" Cascade, 515 F.3d at
3 893 (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456
4 (1993)). The requirements of both claims are similar, "differing
5 primarily in the requisite intent and the necessary level of
6 monopoly power." Image Tech. Servs., Inc. v. Eastman Kodak Co.,
7 125 F.3d 1195, 1202 (9th Cir. 1997) (on remand). In addition to
8 these elements, private party plaintiffs seeking damages for
9 antitrust violations must also demonstrate antitrust injury. Rebel
10 Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).
11 "To show antitrust injury, a plaintiff must prove that his loss
12 flows from an anticompetitive aspect or effect of the defendant's
13 behavior." Id.

14 Abbott asserts that Plaintiffs' claims for monopolization and
15 attempted monopolization fail because they have not demonstrated
16 (1) its possession of monopoly power in the boosted market or
17 (2) anticompetitive conduct. Abbott also maintains that Direct
18 Purchasers did not suffer antitrust injury.

19 A. Monopoly Power

20 Monopoly power is "'the power to control prices or exclude
21 competition.'"² Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th
22

23 ² Courts have used the terms "monopoly power" and "market
24 power" interchangeably. See, e.g., Cost Mgmt. Servs., Inc. v.
Wash. Natural Gas Co., 99 F.3d 937, 950 n.15 (9th Cir. 1996).
25 However, monopoly power is best understood to be the substantial
degree of market power necessary to support liability under Section
2. See Eastman Kodak Co., 504 U.S. at 481 ("Monopoly power under
§ 2 requires, of course, something greater than market power under
§ 1."); Cal. ex rel. Brown v. Safeway, Inc., 615 F.3d 1171, 1187
n.6 (9th Cir. 2010); see also 3B P. Areeda, H. Hovenkamp & J.
Solow, Antitrust Law ¶ 801, at 382 (3d ed. 2007) (hereinafter,
28 (continued...))

1 Cir. 1997) (quoting United States v. Grinnell Corp., 384 U.S. 563,
2 571 (1966)). This may be shown through direct or circumstantial
3 evidence. Forsyth, 114 F.3d at 1467.

4 1. Direct Evidence

5 With respect to direct evidence, Plaintiffs cite this Court's
6 decision in Doe, in which the Court concluded that sufficient
7 direct evidence created a triable issue with respect to Abbott's
8 monopoly power. Like the Doe plaintiffs, Plaintiffs here point to
9 evidence that the 400-percent increase in Norvir's price impacted
10 the boosted market. Dr. Leffler, Plaintiffs' expert, opined that
11 Abbott's control over Norvir, which was a necessary "input" for
12 boosted PIs, gave it control over the boosted market. Stockinger
13 Decl., Ex. 70 ¶ 32. Further, there is evidence that Abbott was
14 aware that raising Norvir's price would affect the boosted market,
15 and that GSK believed that Lexiva's sales performance was
16 negatively impacted by the price hike. See Stockinger Decl., Ex.
17 95, at NOR00091874 and Ex. 118 ¶ 9. The Ninth Circuit has stated,
18 "Direct proof of market power may be shown by evidence of
19 restricted output and supracompetitive prices." Forsyth, 114 F.3d
20 at 1475. There is no rule, however, that this is the only way
21 monopoly power can be proved. Monopoly power may be shown directly
22 through evidence of "injury to competition which a competitor with
23 market power may inflict," which in turn demonstrates "the actual
24 exercise of market power." Id. (quoting Rebel Oil, 51 F.3d at
25 1434). Because Plaintiffs proffer such direct evidence, they

26 _____
27 ²(...continued)
28 Areeda & Hovenkamp). In this Order, the Court uses the term
"monopoly power" to refer to substantial market power.

1 create a triable issue as to whether Abbott had monopoly power in
2 the boosted market.

3 Plaintiffs contend that they have amassed additional direct
4 evidence. They argue that Abbott's pricing of Kaletra above its
5 average marginal cost demonstrated its monopoly power. However,
6 Plaintiffs do not offer evidence that pricing above average
7 marginal cost was necessarily supracompetitive, particularly in the
8 pharmaceutical industry. Indeed, Dr. Leffler opined that Kaletra,
9 Reyataz and Lexiva are all priced "substantially above" average
10 marginal cost. Senator Decl., Ex. B at 191:1-21. That all boosted
11 market participants priced above average marginal cost precludes
12 any inference that such pricing reflected Abbott's monopoly power.

13 Further, supracompetitive pricing, on its own, is not direct
14 evidence of monopoly power. See Forsyth, 114 F.3d at 1476; see
15 also Harrison Aire, Inc v. Aerostar Int'l, Inc., 423 F.3d 374, 381
16 (3d Cir. 2005); Geneva Pharmas. Tech. Corp. v. Barr Laboratories
17 Inc., 386 F.3d 485, 500 (2d Cir. 2004); Blue Cross & Blue Shield
18 United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir.
19 1995). To prove monopoly power directly, supracompetitive pricing
20 must be accompanied by restricted output. Rebel Oil, 51 F.3d at
21 1434. Both are required to prove monopoly power directly.³ Id.

22 _____
23 ³ Plaintiffs nevertheless continue to argue that evidence of
24 restricted output is not required because raising prices
25 necessarily depresses sales. This is incorrect. Take for example
26 a market in which demand outstrips supply. In such a hypothetical
27 market, a firm could raise prices -- up to a certain point --
without necessarily causing a commensurate reduction in sales. In
re ATM Fee Antitrust Litigation, 2010 WL 2557519 (N.D. Cal.), is
both factually and procedurally distinguishable. There, the
plaintiffs alleged that several banks and an ATM network exercised
monopoly power in the "ATM Networks" market by charging

28 (continued...)

1 Plaintiffs argue that they offer evidence of restricted
2 output, albeit indirectly. They do not claim that output in the
3 boosted market decreased following the December, 2003 Norvir price
4 increase; indeed, undisputed evidence shows the contrary. Instead,
5 Plaintiffs maintain that, but for the price hike, output would have
6 been greater. They point to Dr. Leffler's opinion that, had Abbott
7 not increased Norvir's price, its sales of Norvir "would have been
8 substantially higher." Stockinger Decl., Ex. 103 ¶ 58. From this,
9 Plaintiffs argue that sales in the boosted market also would have
10 necessarily been higher, in that a sale of Norvir would ordinarily
11 entail a sale of a boosted PI because Norvir is no longer
12 prescribed as a stand-alone PI. However, Dr. Leffler did not
13 address this point and the discussion to which Plaintiffs refer did
14 not concern the boosted market.

15 Accordingly, Plaintiffs provide direct evidence of Abbott's
16 monopoly power through their proffer of expert opinion and
17 documents regarding the impact of the Norvir price increase on the
18 boosted market.

2. Circumstantial Evidence

20 To prove monopoly power circumstantially, "a plaintiff must:

³(...continued)
22 supracompetitive ATM fees over two decades. Id. at *9-*10. They
23 did not expressly plead restricted output. Id. at *10. The court
24 stated that this did not warrant dismissal of their complaint,
finding that "because price and output are inversely correlated,
the fact that Star, the market leader, has charged supracompetitive
interchange fees for two decades implies that marketwide
25 output . . . has been lower than it would have been had Star
charged a competitive interchange fee." Id. Plaintiffs do not
26 allege that Abbott priced Kaletra above a competitive level for an
extended period of time, a factor the ATM Fee court emphasized in
27 its ruling. Furthermore, to oppose a summary judgment motion,
Plaintiffs are required to proffer evidence supporting a reasonable
28 inference of restricted output.

1 (1) define the relevant market, (2) show that the defendant owns a
2 dominant share of that market, and (3) show that there are
3 significant barriers to entry and show that existing competitors
4 lack the capacity to increase their output in the short run."
5 Rebel Oil, 51 F.3d at 1434. In addition to providing direct
6 evidence, Plaintiffs offer circumstantial evidence of Abbott's
7 monopoly power.

8 a. Relevant Market

9 "A relevant market, for antitrust purposes, can be broadly
10 characterized in terms of the cross-elasticity of demand for or
11 reasonable interchangeability of a given set of products or
12 services." Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.,
13 611 F.3d 495, 507 (9th Cir. 2010) (citations and internal quotation
14 marks omitted). Courts "consider whether the product and its
15 substitutes are reasonably interchangeable by consumers for the
16 same purpose, as well as industry or public recognition of the
17 submarket as a separate economic entity, the product's peculiar
18 characteristics and uses, unique production facilities, distinct
19 customers, distinct prices, sensitivity to price changes, and
20 specialized vendors." Id. (citations omitted).

21 As noted above, Plaintiffs maintain that the relevant market
22 is the boosted market, and that this includes Reyataz, Lexiva and
23 Kaletra and other PIs that require Norvir as a booster. Plaintiffs
24 present evidence of Abbott's internal documents, which, according
25 to Plaintiffs' expert Dr. Singer, indicate that it believed that
26 Reyataz, Lexiva and Kaletra were all in the same market and
27 impacted each other's prices. Further, Abbott's economics expert,
28 Dr. Lagenfeld, acknowledged at his deposition that Kaletra's price

1 would impact its market share relative to its "boosted PI rivals."
2 Stockinger Decl., Ex. 114, at 32:8-23. This is sufficient to
3 create a question of fact on the definition of a boosted market.

4 Abbott challenges Plaintiffs' definition as overly narrow,
5 pointing to Plaintiffs' medical experts' testimony that non-
6 nucleoside reverse transcriptase inhibitors (NNRTIs) are
7 functionally comparable to boosted PIs. See, e.g., Calamari Decl.,
8 Ex. 2, at 145:1-148:11. However, this similarity does not preclude
9 Plaintiffs' definition of the boosted market for antitrust
10 purposes. These experts' testimony suggests that there are several
11 HIV therapies, including NNRTIs and boosted PIs. The testimony is
12 not inconsistent with Plaintiffs' definition of a boosted PI
13 submarket that exists within a broader HIV therapy market. "A
14 submarket exists if it is sufficiently insulated from the larger
15 market so that supply and demand are inelastic with the larger
16 market." Forsyth, 114 F.3d at 1476 (citation and internal
17 quotation marks omitted). Indeed, Plaintiffs offer evidence that
18 the Norvir-driven price increases of boosted PI therapies did not
19 cause a cognizable flight to NNRTIs or other alternative therapies.

20 Abbott also argues that Plaintiffs do not offer any
21 econometric analyses of cross-elasticity. However, Dr. Singer
22 testified at his deposition that he conducted a cross-elasticity
23 analysis, stating that he "looked at changes in market shares
24 around the time of the . . . Norvir price increase, which is a way
25 to get at price cross-elasticity." Stockinger Decl., Ex. 106, at
26 262:7-11. Abbott points to no requirement that such an analysis
27 must be statistical in nature.

28 Accordingly, there is a genuine dispute for trial concerning

1 the definition of a boosted market.

2 b. Abbott's Market Share in the Boosted Market
3 "A mere showing of substantial or even dominant market share
4 alone cannot establish market power sufficient to carry out a
5 predatory scheme." Rebel Oil, 51 F.3d at 1439. Conversely, a
6 "declining market share may reflect an absence of market power, but
7 it does not foreclose a finding of such power." Oahu Gas Serv., Inc. v. Pac. Resources, Inc., 838 F.2d 360, 366 (9th Cir. 1988)
8 (citation omitted).

9 Abbott does not dispute that it commanded an overwhelming
10 share of the boosted market in December, 2003, the time of the
11 Norvir price increase. Nor does it dispute that Plaintiffs'
12 experts show that, through the third quarter of 2007, it held a
13 substantial share of the market. Instead, Abbott challenges the
14 method by which Plaintiffs' experts measure its market share. This
15 does not warrant summary judgment. Whether ritanavir, either sold
16 through Norvir or in co-formulation with lopinavir in Kaletra,
17 should be included in calculating Abbott's market share in the
18 boosted market is a matter to be decided by a jury.

19 Accordingly, there is a genuine dispute for trial concerning
20 whether Abbott owns a sufficiently dominant share of the boosted
21 market.

22 c. Barriers to Entry and Expansion

23 "A high market share, though it may ordinarily raise an
24 inference of monopoly power, will not do so in a market with low
25 entry barriers or other evidence of a defendant's inability to
26 control prices or exclude competitors." Oahu Gas, 838 F.2d at 366
27 (citing Grinnell, 384 U.S. at 571). Barriers to entry include

1 "(1) legal license requirements; (2) control of an essential or
2 superior resource; (3) entrenched buyer preferences for established
3 brands; (4) capital market evaluations imposing higher capital
4 costs on new entrants; and, in some situations, (5) economies of
5 scale." Rebel Oil, 51 F.3d at 1439 (footnote omitted). The
6 existence of entry barriers, however, is not sufficient to support
7 an inference of market power. "The ability to control output and
8 prices -- the essence of market power -- depends largely on the
9 ability of existing firms to quickly increase their own output in
10 response to a contraction by the defendant." Id. at 1441. Control
11 over one market may be considered in determining whether a firm has
12 control of another. See Pac. Coast. Agric. Export Ass'n v. Sunkist
13 Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975).

14 Plaintiffs' experts opined that Abbott had monopoly power
15 based on its high market share in a differentiated product market
16 with high barriers to entry. Dr. Noll, Plaintiffs' expert, stated
17 that this power existed from "2002 through at least the end of
18 2006." Stockinger Decl., Ex. 50, at 8. As Abbott acknowledges,
19 bringing a new drug to market entails high research and development
20 costs and obtaining regulatory approval, both of which constitute
21 barriers to entry. See Barr Labs. Inc., 386 F.3d at 499
22 (concluding that "regulatory requirements to sell" generic drugs
23 were a barrier to entry). Further, Abbott does not dispute that it
24 controls the supply of Norvir, which can be understood to be "an
25 essential . . . resource" for the boosted market. Rebel Oil, 51
26 F.3d at 1439. Its power over a necessary input posed barriers to
27 entry and expansion: to limit either, Abbott could have increased
28 the cost of Norvir, as it did, which could have rendered Kaletra's

1 potential or existing competitors unattractive to consumers. Thus,
2 there is a triable issue as to whether there were barriers to entry
3 and expansion.

4 Abbott contends that the erosion of its market share between
5 December, 2003 and the third quarter of 2007 precludes, as a matter
6 of law, a finding that it had monopoly power. Plaintiffs do not
7 dispute that Kaletra's market share declined from between nineteen
8 and forty-five percent in that period.⁴ Direct Purchasers' Opp'n
9 14.

10 Abbott relies primarily on United States v. Syufy Enterprises,
11 903 F.2d 659 (9th Cir. 1990). There, the court concluded that,
12 although a firm had a large market share, its inability to maintain
13 it demonstrated a lack of monopoly power. Id. at 666. The market
14 in Syufy, however, had no substantial barriers to entry. 903 F.2d
15 at 666-67 (contrasting circumstances there to cases involving
16 industries that required "onerous front-end investments that might
17 deter competition from all but the hardest and most financially
18 secure investors"). Abbott correctly notes that Syufy did not
19 expressly limit its teachings to circumstances in which entry
20 barriers are absent. However, as Oahu Gas indicates, declining
21 market share is not necessarily sufficient to warrant summary
22 judgment. See 838 F.2d at 366; see also Areeda and Hovenkamp,
23 Antitrust Law, ¶ 801a2, at 385 ("[A] steadily declining share

24 _____
25 ⁴ The variation arises from whether ritonavir, as provided in
Norvir or as a component of Kaletra, should be considered as part
of Abbott's share of the boosted market. Direct Purchasers'
expert, Dr. Singer, includes ritonavir in his calculation, whereas
GSK's expert, Dr. Noll, does not. If ritonavir is included,
Abbott's market share was seventy-five percent in Q3 2007; if it is
excluded, Abbott's share is below fifty percent.

1 suggests that substantial power is transitory However, it
2 is not in itself enough."). Although it may be that Abbott lacked
3 monopoly power, this is for a jury to decide.

4 Accordingly, through both direct and circumstantial evidence,
5 Plaintiffs create a triable issue of fact as to whether Abbott had
6 monopoly power. Summary judgment is not warranted on the ground
7 that Abbott lacked monopoly power.

8 B. Anticompetitive Conduct

9 As noted above, in addition to demonstrating monopoly power,
10 Plaintiffs must provide evidence of anticompetitive conduct.

11 Four theories of anticompetitive conduct have been raised in
12 this action: (1) predatory pricing through bundled-product
13 discounting, which GSK terms the "equally efficient competitor
14 test"; (2) a violation of Abbott's antitrust duty to deal; (3) a
15 "monopoly leveraging plus" theory based on government-pricing rules
16 in the boosting market; and (4) a business tort theory under
17 Conwood. At the hearing on Abbott's motions, Direct Purchasers and
18 GSK clarified that they seek Section 2 liability based on each of
19 the four theories, even though they may not have raised them in
20 their respective opposition briefs to Abbott's current motions and
21 motions to dismiss. They maintain that their complaints offer
22 sufficient allegations to put Abbott on notice of these theories.

23 Abbott argues that, to assert a predatory pricing theory of
24 liability, GSK must amend its complaint.⁵ Although GSK must plead
25 every claim for which it seeks relief, it need not plead the legal

27 ⁵ Abbott does not contend that, to seek liability under the
28 "monopoly leveraging plus" and Conwood theories, Direct Purchasers
must amend their complaints.

1 theories that support liability. See, e.g., Alvarez v. Hill, 518
2 F.3d 1152, 1154 (9th Cir. 2008) ("[F]ederal complaints plead
3 claims, not . . . legal theories."); Am. Timber & Trading Co. v.
4 First Nat'l Bank of Or., 690 F.2d 781, 786 (9th Cir. 1982) ("A
5 party need not plead specific legal theories in the complaint, so
6 long as the other side receives notice as to what is at issue in
7 the case."). GSK pleads a claim for a violation of Section 2 of
8 the Sherman Act and alleges that Abbott's pricing excluded "equally
9 efficient producers of PIs." GSK's 1st Am. Compl. ¶ 52. Abbott is
10 well aware of what is at issue in this case. Accordingly, GSK may
11 proceed on a legal theory based on predatory pricing without
12 amending its complaint.

13 1. Predatory Pricing through Bundled-Product
14 Discounting

15 First, Plaintiffs assert that Abbott acted anticompetitively
16 by engaging in predatory pricing with respect to Kaletra, which
17 they maintain is a bundled product containing lopinavir and
18 ritonavir. In particular, Direct Purchasers maintain that, under
19 Cascade's discount attribution rule, the imputed price of
20 lopinavir, the competitive component of Kaletra, is below its
21 average variable cost to produce and, therefore, predatory. Abbott
22 maintains that Kaletra is not a bundled product and Cascade does
23 not apply. Abbott does not challenge Dr. Singer's conclusion that,
24 under the Cascade discount attribution rule, lopinavir's imputed
25 price is below its average variable cost.

26 Direct Purchasers argue that Abbott should be held to its
27 prior litigation position that Kaletra is a bundled product, either
28 because its earlier statements constitute admissions of fact or

1 because it should be estopped from asserting otherwise. This
2 argument is unavailing. Abbott's earlier statements were not
3 admissions of fact, but rather legal arguments. See In re
4 Teleglobe Commc'n Corp., 493 F.3d 345, 377 (3d Cir. 2007) ("To be
5 binding, admissions . . . must be statements of fact that require
6 evidentiary proof, not statements of legal theories."); Am. Title
7 Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir. 1988)
8 (stating that trial courts have discretion to accept statements of
9 fact as judicial admissions). Nor does judicial estoppel apply
10 here. Although the "doctrine of judicial estoppel bars a party
11 from taking inconsistent positions in the same litigation," it does
12 not apply if "no court ever adopted the original . . . position."
13 Masayevsa ex rel. Hopi Indian Tribe v. Hale, 118 F.3d 1371, 1382
14 (9th Cir. 1997); see also Hamilton v. State Farm Fire & Cas. Co.,
15 270 F.3d 778, 782 (9th Cir. 2001) (in determining whether judicial
16 estoppel should apply, "courts regularly inquire whether the party
17 has succeeded in persuading a court to accept that party's earlier
18 position"). Because no court accepted Abbott's earlier legal
19 arguments that Kaletra was a bundled product under Cascade, they do
20 not judicially estop Abbott from taking a different legal position
21 in light of linkLine and the Ninth Circuit's opinion in Doe.
22 Here, Abbott maintains that Kaletra is a single, integrated
23 product, "no more a bundle of its APIs [active pharmaceutical
24 ingredients] than bread is a bundle of flour, milk, and salt."
25 Mot. for Summ. J. on Direct Purchasers' Claims 19. It maintains
26 that the Cascade court intended the discount attribution rule to be
27 applied only to bundles comprised of "separate, independent
28 products being packaged or sold together for a single price." Id.

1 Direct Purchasers respond that their "economists have concluded
2 that Kaletra is a bundle . . . because consumers would, could, and
3 did assemble the bundle (boosted PI plus ritonavir) on their own."
4 Direct Purchasers' Opp'n 20. In other words, Direct Purchasers
5 maintain that bundles are comprised of products that consumers
6 naturally would purchase together.

7 Abbott's arguments are not persuasive. Retail drugs and their
8 APIs present special challenges with regard to bundling. Abbott
9 explains in detail that APIs must be combined with "excipients,
10 principally solvents and stabilizers, in a formulation designed to
11 optimize factors including chemical stability, provision of
12 appropriate blood levels of the API, manufacturability, and pill
13 burden." Mot. for Summ. J. on Direct Purchasers' Claims 4. Thus,
14 bundling ritonavir and lopinavir in Kaletra entails more than
15 bundling shampoo and conditioner in a shrink-wrapped package.
16 Nonetheless, Kaletra presents a bundle of two products, a boosting
17 PI and boosted PI, sold together for a single price. Consumers do
18 not purchase Kaletra for its excipients, which by definition are
19 its inert ingredients; the excipients serve only to make the API
20 "bioavailable," as Abbott explains. Abbott's Reply in Support of
21 Summ. J. on Direct Purchasers' Claims 13. Instead, consumers
22 purchase Kaletra to obtain the APIs. Thus, for the purposes of
23 Cascade, the bundled "products" here are ritonavir and lopinavir.

24 Abbott's bread analogy is therefore inapt. Consumers do not
25 purchase bread in order to obtain flour, milk and salt. Further,
26 unlike the combination of flour, milk, salt and other ingredients
27 to make bread, the combination of lopinavir and ritonavir does not
28 create a product functionally different from its components.

1 Bundled or separate, these two APIs remain PIs.

2 Accordingly, Kaletra can be regarded as a bundled product for
3 the purposes of Cascade's discount attribution rule. As noted
4 above, this was the only challenge Abbott raised with respect to
5 Plaintiffs' predatory pricing theory of liability. Thus,
6 Plaintiffs' monopolization and attempted monopolization claims are
7 viable to the extent that they are based on this theory.

8 2. Violation of an Antitrust Duty to Deal

9 Plaintiffs' second theory is that Abbott acted
10 anticompetitively by violating its antitrust duty to deal. Their
11 theory rests on allegations that

12 Abbott engaged in a long-standing pattern to induce its
13 rivals to develop and promote their PIs for use with
14 Norvir, including use of licensing agreements, and then
15 radically altered its conduct -- through its massive and
sudden price hike that made rivals' boosted PIs much more
expensive than Kaletra virtually overnight -- to impair
rivals' ability to compete in the boosted market.

16 Direct Purchasers' Opp'n 23. Abbott contends that there is no
17 evidence that Norvir was priced at a level that its rivals or
18 consumers "could not accept" or evidence that it unilaterally
19 terminated a voluntary course of dealing with its rivals to set
20 Norvir's price.

21 "As a general rule, businesses are free to choose the parties
22 with whom they will deal, as well as the prices, terms, and
23 conditions of that dealing." linkLine, 129 S. Ct. at 1118.
24 However, there are "limited circumstances in which a firm's
25 unilateral refusal to deal with its rivals can give rise to
26 antitrust liability." Id. (citing Aspen Skiing Co. v. Aspen
Highlands Skiing Corp., 472 U.S. 585 (1985)).

28 In Aspen Skiing, the Supreme Court upheld a jury verdict of

1 Section 2 liability when a "monopolist elected to make an important
2 change in a pattern of distribution that had originated in a
3 competitive market and had persisted for several years." 472 U.S.
4 at 603. The defendant owned three of the four ski resorts in
5 Aspen, Colorado. Id. at 587-89. For several years, the defendant,
6 along with the plaintiff who owned the fourth ski resort, had
7 offered a ski lift pass that could be used at any Aspen ski resort.
8 Id. at 589-90. Proceeds from the sale of the all-Aspen pass were
9 divided between the defendant and the plaintiff, based on a survey
10 of which resorts consumers actually frequented. Id. at 590-91.
11 The plaintiff's share of revenue fluctuated year-to-year, depending
12 on its attendance attributable to the ski pass. Believing, among
13 other things, that the survey upon which revenues were allocated
14 was inaccurate and that the ski pass "was siphoning off revenues
15 that could be recaptured," the defendant sought to discontinue the
16 joint program. Id. at 592. It extended the plaintiff "an offer
17 that it could not accept;" the defendant would agree to continue
18 the program only if the plaintiff agreed to a fixed percentage of
19 revenue, far below what the plaintiff had received in the past.
20 Id. After the plaintiff rejected this offer, the defendant took
21 actions "that made it extremely difficult" for the plaintiff to
22 compete. Id. at 593. In particular, the defendant refused to sell
23 the plaintiff any lift tickets, even at the retail price. Id.
24 Eventually, the plaintiff's market share plummeted. Id. at 594-95.
25 On appeal, the defendant asserted that it had no duty to deal
26 with the plaintiff. The Supreme Court agreed that, generally, a
27 business has a right to select customers and associates, but stated
28 that this right is not unqualified. Id. at 601. Quoting Lorain

1 Journal Co. v. United States, 342 U.S. 143, 155 (1951), the Supreme
2 Court stated,

3 The right . . . is neither absolute nor exempt from
4 regulation. Its exercise as a purposeful means of
5 monopolizing interstate commerce is prohibited by the
6 Sherman Act. . . . "In the absence of any purpose to
7 create or maintain a monopoly, the act does not restrict
 the long recognized right of trader or manufacturer
 engaged in an entirely private business, freely to
 exercise his own independent discretion as to parties
 with whom he will deal."

8 Aspen Skiing, 472 U.S. at 602 (emphasis supplied by Aspen Skiing
9 court). Because it found sufficient evidence that anticompetitive
10 intent motivated the defendant's unreasonable offer, the Court
11 upheld the jury's verdict in favor of the plaintiff.

12 In Verizon Communications Inc. v. Law Offices of Curtis V.
13 Trinko, LLP, 540 U.S. 398 (2004), the Supreme Court revisited Aspen
14 Skiing. There, the plaintiff brought Section 2 claims, alleging
15 that, under Aspen Skiing, Verizon violated an antitrust duty to
16 deal when it failed to provide its rivals with timely access to its
17 telecommunications network, for which Verizon had already been
18 sanctioned by government agencies under the Telecommunications Act
19 of 1996. Id. at 403-05. The Court rejected the plaintiff's claim.
20 Although the Court reaffirmed the potential for liability under
21 Aspen Skiing, it distinguished that case and reasoned that the
22 Aspen Skiing Court "found significance" in two of the defendant's
23 acts, both of which suggested anticompetitive motives: (1) the
24 "unilateral termination of a voluntary (and thus presumably
25 profitable) course of dealing" and (2) "the defendant's
26 unwillingness to renew the ticket even if compensated at retail
27 price." Trinko, 540 U.S. at 409 (emphasis in original). Unlike
28 the Aspen Skiing plaintiff, Trinko did not allege that Verizon

1 "voluntarily engaged in a course of dealing with its rivals, or
2 would ever have done so absent statutory compulsion." Id. Thus,
3 the Court reasoned, Verizon's "prior conduct sheds no light upon
4 the motivation of its refusal to deal -- upon whether its
5 regulatory lapses were prompted not by competitive zeal but by
6 anticompetitive malice." Id. The Court also noted that the
7 Telecommunications Act of 1996 required Verizon to provide services
8 not available to the public, which made the case "different from
9 Aspen Skiing in a more fundamental way." Id. The Court explained,

10 In Aspen Skiing, what the defendant refused to provide to
11 its competitor was a product that it already sold at
12 retail -- to oversimplify slightly, lift tickets
13 representing a bundle of services to skiers. Similarly,
14 in Otter Tail Power Co. v. United States, another case
15 relied upon by respondent, the defendant was already in
16 the business of providing a service to certain customers
(power transmission over its network), and refused to
17 provide the same service to certain other customers. In
18 the present case, by contrast, the services allegedly
withheld are not otherwise marketed or available to the
public. The sharing obligation imposed by the 1996 Act
created "something brand new" -- "the wholesale market
for leasing network elements." The unbundled elements
offered pursuant to § 251(c)(3) exist only deep within
the bowels of Verizon; they are brought out on compulsion
of the 1996 Act and offered not to consumers but to
rivals, and at considerable expense and effort.
19

20 Id. at 410 (citations omitted).

21 In MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124 (9th
22 Cir. 2004), the Ninth Circuit reconsidered, in light of Trinko, its
23 prior reversal of a district court's grant of summary judgment in
24 favor of an antitrust defendant. The court noted that Trinko
25 identified three circumstances that were "significant for creating
26 antitrust liability": (1) "the unilateral termination of a
27 voluntary and profitable course of dealing;" (2) a refusal to deal
28 or an "offer to deal with a competitor only on unreasonable terms

1 and conditions," which could "amount to a practical refusal to
2 deal;" and (3) a refusal to provide competitors with "products that
3 were already sold in a retail market to other customers."
4 MetroNet, 383 F.3d at 1132-34. Concluding that the plaintiffs'
5 evidence did not contain these hallmarks, the court noted that
6 their theory of liability did "not fit comfortably in the Aspen
7 Skiing mold" and affirmed summary judgment in favor the defendant.
8 Id. at 1132.

9 Here, in its motion to dismiss, Abbott argued, based on Trinko
10 and MetroNet, that Plaintiffs' antitrust duty-to-deal claims did
11 not fall within the scope of Aspen Skiing. The Court denied the
12 motion, holding that liability under Section 2 could arise if a
13 defendant unilaterally alters a voluntary course of dealing and
14 "anticompetitive malice" motivates the defendant's conduct. See
15 MetroNet, 383 F.3d at 1131-32. The Court noted MetroNet's
16 observation that Aspen Skiing could apply in cases involving a
17 practical refusal to deal, in which a defendant offered its
18 competitors only on unreasonable terms and conditions. In
19 opposition to Abbott's motions for summary judgment, Plaintiffs
20 provide evidence that creates a genuine issue of fact with respect
21 to the three factors of significance identified in MetroNet and the
22 elements outlined by the Court in its order on Abbott's motions to
23 dismiss.

24 Plaintiffs offer evidence that Abbott unilaterally terminated
25 a voluntary course of dealing by increasing the price of Norvir
26 approximately four hundred percent and did so at some expense.
27 Plaintiffs offer undisputed evidence that, before December, 2003,
28 Abbott's previous price increases were in line with the rate of

1 inflation. Further, Dr. Noll opines that Norvir's 400-percent
2 price increase in December, 2003 came at some cost, including a
3 diminished rate of profit and a drop in Abbott's stock price.
4 Abbott responds that Trinko found anticompetitive significance only
5 in unilateral changes in "cooperative ventures" between
6 competitors. But Trinko did not so hold. The Trinko Court noted
7 that Aspen Skiing involved such a venture, but it was the
8 unilateral termination of a voluntary and profitable course of
9 dealing that controlled.⁶ 540 U.S. at 409. Indeed, in MetroNet,
10 the defendant had engaged in a general course of dealing with
11 respect to all of its customers, not just the plaintiff reseller.
12 383 F.3d at 1132. Nevertheless, the Ninth Circuit did not find
13 this dispositive; instead, its ruling was based on the lack of
14 evidence that the defendant forsook short-term profits. Id. Here,
15 Plaintiffs have offered such evidence.

16 Plaintiffs have likewise tendered evidence of a practical
17 refusal to deal. For instance, Abbott does not dispute that the
18 Norvir price hike made Kaletra's rival boosted PI therapies
19 significantly more expensive. To illustrate, the Norvir price
20 increase caused the cost of a therapy based on GSK's Lexiva to jump
21 from \$19.42 to \$33.14. A jury could view this as an offer to deal
22 only on unreasonable terms and conditions. Abbott argues that
23 consumers' continued purchases of Norvir precludes, as a matter of

24
25 ⁶ Even if a unilateral change in a cooperative venture is
26 required, Plaintiffs provide evidence of such a change. Abbott
27 does not dispute that, prior to the Norvir price hike, it
28 participated in co-marketing agreements with its competitors and
followed a practice of increasing Norvir's price based on the rate
of inflation. Thus, a jury could view Abbott as having
unilaterally changed the nature of its cooperative ventures with
its competitors.

1 law, a finding that its price was unreasonable. This argument is
2 unavailing. Doctors might have continued to prescribe an
3 unreasonably priced drug if it were necessary to the health or life
4 of their patients.

Finally, a jury could infer that Abbott refused to provide its competitors with Norvir on the same terms that it provided the drug to its retail customers. As noted above, Norvir is the trade name for the API ritanovir. To avail themselves of the benefits of ritanovir, patients taking Abbott's competitors' boosted PI therapies are required to purchase Norvir. Abbott, however, provides ritanovir to patients taking Kaletra at a significantly cheaper price.

13 Furthermore, as noted in the Court's prior ruling, Plaintiffs
14 offer evidence -- comments by Abbott's executives -- that suggests
15 Abbott engaged in this conduct with anticompetitive malice.
16 Plaintiffs' experts show that Kaletra sales benefitted from the
17 increase in Norvir's price. Finally, GSK points to damages it
18 suffered based on Abbott's conduct.

19 Accordingly, Plaintiffs offer sufficient evidence to create a
20 genuine issue of fact with respect to whether Abbott's conduct
21 constituted a violation of its antitrust duty to deal, as defined
22 by Aspen Skiing. Thus, Plaintiffs' monopolization and attempted
23 monopolization claims are viable to the extent that they are based
24 on this theory, as well as on the predatory pricing theory
25 explained above.

3. Monopoly Leveraging in a Market with Government Pricing Rules

Plaintiffs' third theory is that Abbott leveraged its monopoly

1 in the boosting market, which is regulated by government pricing
2 rules, to maintain or obtain a monopoly in the boosted market. At
3 the hearing on Abbott's motions to dismiss Plaintiffs' amended
4 complaints, the Court called this a "monopoly leveraging plus"
5 theory because, although it rests on allegations of monopoly
6 leveraging, it includes the additional factor of government pricing
7 rules in the boosting market. Although Direct Purchasers adopted
8 this theory at the hearing on Abbott's summary judgment motions,
9 only GSK provided briefing on it.

10 As explained above, the Ninth Circuit in Doe held that, based
11 on linkLine, monopoly leveraging, on its own, is not proscribed
12 under Section 2. GSK asserts that the Supreme Court's and Ninth
13 Circuit's rejection of liability based solely on monopoly
14 leveraging rested on a "single monopoly profit (SMP) theory," which
15 reflects a precept that "in most monopoly leveraging cases a
16 monopolist can only take its monopoly profit once." GSK Opp'n to
17 Abbott's Supp. Brief 2. It argues that this theory does not apply
18 in a government-regulated market and, thus, antitrust liability may
19 nevertheless lie for monopoly leveraging on its own.

20 The Court is not persuaded. The Ninth Circuit in Doe
21 addressed a free-standing monopoly leveraging theory in the context
22 of the circumstances in this case and held it to be insufficient to
23 sustain a Section 2 claim. Indeed, GSK acknowledges that, in its
24 amicus brief submitted in the Doe appeal, it raised its arguments
25 concerning the government pricing rules.

26 Further, in linkLine, the defendant's prices in the upstream,
27 wholesale market were likewise subject to regulation. See 129 S.
28 Ct. at 1115. This did not change the outcome in that case. See

1 129 S. Ct. at 1124 (Breyer, J., concurring in judgment). GSK cites
2 several cases in which courts opined that regulation in a
3 monopolized market, but not in an adjacent market, could alter the
4 analysis as to whether monopoly leveraging, on its own, is
5 actionable. See, e.g., Alaska Airlines, Inc. v. United Airlines,
6 Inc., 948 F.2d 536, 549 (9th Cir. 1991); Town of Concord, Mass. v.
7 Boston Edison Co., 915 F.2d 17, 29 (1st Cir. 1990). However, these
8 cases were decided before linkLine and Doe.

9 After linkLine and Doe, a free-standing monopoly leveraging
10 theory of liability is not cognizable in this case. Accordingly,
11 the Court summarily adjudicates that Plaintiffs may not base their
12 monopolization and attempted monopolization claims on a "monopoly
13 leveraging plus" theory.

14 4. Tortious Conduct

15 Plaintiffs' final theory of anticompetitive conduct rests on
16 the Sixth Circuit's decision in Conwood. Although Direct
17 Purchasers adopted this theory at the hearing on Abbott's motions,
18 only GSK provided briefing on it.

19 In Conwood, the defendant destroyed the plaintiff's store
20 racks and offered false information to retailers about competitors'
21 products. 290 F.3d at 775-79, 783. The Sixth Circuit upheld a
22 jury's finding that the defendant's "pervasive practice of
23 destroying [the plaintiff's advertisements] and reducing the number
24 of [the plaintiff's displays] through exclusive agreements with and
25 misrepresentations to retailers was exclusionary conduct without a
26 sufficient justification" Id. at 788. GSK asserts that
27 Conwood applies here because Abbott's price hike interfered with
28

1 its ability to promote Lexiva.⁷

2 Abbott's challenged acts are not analogous to those of the
3 Conwood defendant. The Conwood court stated, "Business torts will
4 be violative of § 2 only in 'rare gross cases.'" 290 F.3d at 784.
5 GSK focuses primarily on Abbott's acts of "announcing and timing a
6 massive price hike to hamper a key competitive product upon its
7 introduction." GSK's Opp'n to Abbott's Supp. Brief 6. GSK does
8 not argue that these acts constituted business torts, nor does it
9 contend that Abbott committed the type of widespread tortious
10 conduct at issue in Conwood.

11 Accordingly, the Court summarily adjudicates that Abbott
12 cannot suffer Section 2 liability based on Conwood. Thus,
13 Plaintiffs' Section 2 claims concerning the boosted market may only
14 be based on the predatory pricing and duty-to-deal theories
15 discussed above.

16 C. Direct Purchasers' Antitrust Injury

17 As noted above, private plaintiffs seeking damages for federal
18 antitrust violations must demonstrate antitrust injury. Abbott
19 challenges Direct Purchasers', although not GSK's, showing with
20 respect to antitrust injury.

21 First, Abbott relies on Brooke Group v. Brown & Williamson
22 Tobacco Corp., 509 U.S. 209 (1993), to argue that predatory pricing
23 always benefits consumers because, "until the elimination of
24 competition, purchasers . . . can purchase the goods or services at

25
26 ⁷ In its original opposition, GSK claimed that Abbott's
27 publication of misleading price comparisons is analogous to the
false information in Conwood. However, in its supplemental
opposition, GSK clarified that its Conwood theory is based solely
on the announcement and timing of the Norvir price increase.
28

1 issue for less than if the defendant were not engaged in predatory
2 pricing." Mot. for Summ. J. on Direct Purchasers' Claims 24.
3 However, Brooke Group concerns single-product predatory pricing,
4 where a defendant's products are sold below cost. Under Cascade's
5 bundled discounting exception to Brooke Group, a bundled product
6 can be found to be predatorily priced if the competitive component
7 of the bundled product is deemed, under the "discount attribution
8 standard," to be sold below cost, even though the bundle as a whole
9 is priced above cost. 515 F.3d at 906. Thus, predatory pricing
10 does not always benefit consumers. Here, there is evidence that
11 Direct Purchasers paid supracompetitive prices for Kaletra, a
12 bundled product. This creates a genuine issue of material fact as
13 to whether Direct Purchasers suffered antitrust injury.

14 Second, Abbott argues that Direct Purchasers' theory of
15 liability is contradictory. On the one hand, Abbott argues, Direct
16 Purchasers claim that it engaged in predatory pricing. Abbott
17 notes that Direct Purchasers maintain that a Kaletra-based therapy
18 costs less than its rivals' therapies because it predatorily priced
19 a bundle of lopinavir and ritonavir. On the other hand, Abbott
20 asserts, Direct Purchasers claim that it charged monopoly prices
21 for Kaletra. These allegations are not necessarily inconsistent.
22 Although Kaletra costs less than other boosted PI therapies, which
23 are more expensive due to Norvir's allegedly inflated price, a jury
24 could agree with Plaintiffs' experts that Abbott's conduct caused
25 all prices in the boosted market to be higher than they would have
26 been, but for Abbott's pricing conduct. Further, Direct Purchasers
27 posit that Abbott's scheme was intended to operate in two stages:
28 (1) the Norvir price increase functioned to raise the cost of

1 Kaletra's rival therapies, making them unattractive to consumers
2 and (2) once this was achieved, Abbott raised the price of Kaletra
3 to a price higher than what Abbott could have commanded but for the
4 Norvir price increase. Direct Purchasers contend that they were
5 injured by Abbott's subsequent inflation of the price of Kaletra,
6 and their experts corroborate this.

7 Accordingly, summary judgment is not warranted on Direct
8 Purchasers' claims based on Abbott's argument that they fail to
9 show antitrust injury. Because Plaintiffs create triable issues
10 with respect to every element of their Section 2 claims pertaining
11 to the boosted market, Abbott's motion for summary judgment with
12 respect to these claims must be denied.

13 II. Sherman Act Claims for Monopolization of the Boosting Market
14 Direct Purchasers, but not GSK, bring Section 2 claims for
15 Abbott's alleged unlawful monopolization of the boosting market.
16 They assert that Abbott monopolized this market by stifling
17 innovation through inducing its competitors to "standardize around
18 the use of Norvir for boosting purposes." Direct Purchasers' Opp'n
19 24. Abbott argues that this monopolization claim fails because
20 there is no evidence of (1) below-cost pricing or (2) competitors
21 refraining from developing or introducing PI boosters.

22 Direct Purchasers offer no evidence to support their claim.
23 They cite Dr. Noll's report, even though he focused solely on how
24 "Abbott's pricing behavior has created an artificial financial
25 barrier to innovation in boosted PIs." Stockinger Decl., Ex. 50,
26 at 132. Indeed, Dr. Noll stated at his deposition that the price
27 hike increased the "incentive to innovate" in the boosting market.
28 Senator Decl., Ex. A, at 61:7-10. Dr. Singer also offers no

1 support. Like Dr. Noll, he addressed reduced innovation in the
2 boosted market and, to the extent that he discussed the boosting
3 market, he merely assumed that "Plaintiffs can show that Abbott's
4 competitors delayed or deferred developing alternatives to Norvir."
5 Stockinger Decl., Ex. 69, at 39-40. Dr. Singer did not identify
6 any evidence that the price hike actually had this effect.

7 Direct Purchasers did not respond to Abbott's argument that
8 Norvir was not priced below cost, which is a necessary predicate
9 for predatory pricing with respect to single products. See Brooke
10 Group, 509 U.S. at 223. Further, that Abbott had monopoly power in
11 the boosting market and charged monopoly prices does not violate
12 Section 2. Doe, 571 F.3d at 934.

13 Accordingly, summary judgment is granted on the Direct
14 Purchasers' claims for monopolization of the boosting market.

15 III. GSK's State Law Claims

16 A. Breach of the Implied Covenant of Good Faith and Fair
17 Dealing under New York Law

18 GSK asserts that Abbott breached the implied covenant of good
19 faith and fair dealing with respect to their licensing agreement
20 for the co-marketing of Norvir and GSK's PIs, including Lexiva.⁸
21 Abbott responds that it did not breach the implied covenant and
22 that, even if it did, New York law and the contract preclude
23 recovery for lost profits and restitution, as sought by GSK.

24 1. Breach

25 "The implied covenant of good faith and fair dealing between
26 parties to a contract embraces a pledge that 'neither party shall

27 ⁸ The parties' agreement, which has been filed under seal,
28 contains a choice-of-law provision that designates New York law as
controlling. Calamari Decl., Ex. 23 ¶ 11.4.

1 do anything which will have the effect of destroying or injuring
2 the right of the other party to receive the fruits of the
3 contract.'" Moran v. Erk, 11 N.Y.3d 452, 456 (2008) (quoting 511
4 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153
5 (2002)). The implied covenant encompasses "'any promises which a
6 reasonable person in the position of the promisee would be
7 justified in understanding were included.'" Jennifer Realty, 98
8 N.Y.2d at 153 (quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d
9 62, 69 (1978)); accord M/A-COM Sec. Corp. v. Galesi, 904 F.2d 134,
10 136 (2d Cir. 1990) (stating that the implied covenant doctrine is
11 used to "effectuate the intentions of the parties, or to protect
12 their reasonable expectations") (citation omitted).

13 GSK maintains that Abbott violated the implied covenant by
14 injuring GSK's "right to enhance its profits from Lexiva sales by
15 promoting Lexiva for boosted use with Norvir." GSK Opp'n 7. It
16 maintains that "the purpose of the contract was to allow GSK to
17 increase sales of Lexiva by promoting it with Norvir." Id. In
18 support of its claim, it tenders expert opinion that GSK lost sales
19 as a result of the Norvir price hike and that, but for the
20 increase, Lexiva would have had a larger share of the boosted
21 market. GSK also provides evidence that Abbott knew that co-
22 marketing was one benefit GSK sought when it entered into the
23 contract. James Tyree, who was then Abbott's head of business
24 development, agreed with GSK's counsel that a benefit of the
25 license was that it permitted GSK to market its PIs in tandem with
26 Norvir, which would "hopefully" result in increased sales.
27 Stockinger Decl., Ex. 1, Tyree Depo. 39:7-40:6. And John Poulos,
28 who negotiated with GSK on behalf of Abbott, agreed with GSK's

1 counsel's assertion that the license gave Abbott's competitors the
2 opportunity to promote Norvir with their boosted PIs.

3 Abbott's arguments are unavailing. Although Abbott disputes
4 the nature of the implied promises arising from its agreement with
5 GSK, this is not sufficient to justify summary judgment. The
6 evidence supports a finding that, after executing a co-marketing
7 agreement with Abbott, GSK justifiably understood that Abbott would
8 not drastically increase the price of Norvir at a time designed to
9 interfere with the launch of GSK's co-marketed product. Abbott
10 also argues that there is no evidence that it "'directly
11 destroyed'" GSK's right to co-promote its products with Norvir.
12 Reply at 11 (quoting MA/COM, 904 F.2d at 136). However, GSK's
13 theory is that Abbott injured, not destroyed, its right.

14 Abbott also cites Moran, in which New York's high court
15 rejected the plaintiffs' claim for a breach of the implied
16 covenant. There, the plaintiffs claimed that they were deprived of
17 "the fruits" of a contract when the defendants, after having
18 "qualms about purchasing the Morans' house," instructed their
19 attorney not to approve the purchase contract. 11 N.Y.3d at 454-
20 55. The court, however, noted that the contract contained a clause
21 that explicitly stated that the contract was "contingent upon
22 approval by attorneys for Seller and Purchaser." Id. at 456
23 (emphasis omitted). Based on this clause, the court concluded that
24 "the plain language of the contract in this case makes clear that
25 any 'fruits' of the contract were contingent on attorney approval,
26 as any reasonable person in the Morans' position should have
27 understood." Id. at 457. Here, there were no contingencies placed
28 on GSK's right to co-market its PIs with Norvir. Indeed, Tyree

1 testified that, at the time of their negotiations, Abbott did not
2 inform GSK that it was then considering changes in either the
3 supply or price of Norvir.

4 Abbott does not establish that, as a matter of law, it was
5 unreasonable for GSK to expect that Abbott would not injure its
6 right to market its PIs along with Norvir.

7 2. Damages

8 GSK seeks damages for the breach of the implied covenant in
9 the form of its alleged lost profits, and restitution for the
10 consideration it offered for the co-marketing license.

11 a. Lost Profits

12 Abbott maintains that, under New York law, lost profits are
13 consequential damages that are not recoverable for a breach of the
14 implied covenant. Abbott also argues that, because lost profits
15 are consequential damages, a liability-limiting clause in the
16 contract bars GSK from recovering them.

17 In Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.,
18 the Second Circuit, applying New York law, explained the
19 difference between lost profits as consequential damages and as
20 general damages:

21 Lost profits are consequential damages when, as a result
22 of the breach, the non-breaching party suffers loss of
23 profits on collateral business arrangements. . . . In
24 New York, a party is entitled to recover this form of
25 lost profits only if (1) it is demonstrated with
certainty that the damages have been caused by the
breach, (2) the extent of the loss is capable of proof
with reasonable certainty, and (3) it is established that
the damages were fairly within the contemplation of the
parties.

26 By contrast, when the non-breaching party seeks only to
27 recover money that the breaching party agreed to pay
28 under the contract, the damages sought are general
damages.

1 487 F.3d 89, 109-10 (2d Cir. 2007) (footnotes, citations and
2 internal quotation marks omitted); see also Am. List Corp. v. U.S.
3 News & World Report, Inc., 75 N.Y.2d 38, 43 (1989).

4 Here, GSK maintains that it would have received additional
5 revenue from third parties had Abbott not raised the price of
6 Norvir. See GSK Opp'n 11. GSK does not contend that any of its
7 lost profits are monies owed by Abbott under the contract. Thus,
8 the lost profits GSK seeks are best characterized as consequential,
9 not general, damages.

10 Abbott cites Travellers International A.G. v. TWA, 41 F.3d
11 1570 (2d Cir. 1994), for the proposition that New York law
12 precludes recovery of consequential damages for breach of the
13 implied covenant. There, the Second Circuit stated that "a damage
14 award for lost profits cannot rest upon the breach of the implied
15 duty of good faith and fair dealing." Id. at 1576. However, the
16 court did not cite any authority for this proposition, and Abbott
17 did not identify, nor did the Court find, any supporting New York
18 case law. The Travellers court affirmed the award of lost profits
19 as damages, although based on the theory that the defendant
20 breached a provision of the contract. 41 F.3d at 1577-81.
21 Further, contrary to the Second Circuit's statement, a New York
22 state appellate court found cognizable a request for consequential
23 damages based on a breach of the implied covenant, concluding that
24 the request was sufficiently plead. Panasia Estates, Inc. v.
25 Hudson Ins. Co., 889 N.Y.S.2d 452, 453 (2009). Because there is no
26 authority that bars recovery for lost profits based on a breach of
27 the implied covenant, summary judgment is not warranted on this
28 ground.

1 Abbott next argues that the parties' contract prohibits
2 recovery for consequential damages. The relevant provision states,
3 "EXCEPT AS OTHERWISE PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR
4 ANY SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL LOSSES ARISING
5 OUT OF OR RELATING TO THIS AGREEMENT . . ." Calamari Decl., Ex.
6 23 at NOR0004428 (upper case in original). Abbott's conduct,
7 however, could render the relevant provision inoperable.

8 In Sommer v. Federal Signal Corporation, New York's high court
9 stated that it "is the public policy of this State . . . that a
10 party may not insulate itself from damages caused by grossly
11 negligent conduct," a principle that "applies equally to contract
12 clauses purporting to exonerate a party from liability and clauses
13 limiting damages to a nominal sum." 79 N.Y.2d 540, 554 (1992).
14 The court explained that, to render such a clause inoperative,
15 conduct must evince "a reckless indifference to the rights of
16 others" and "smack of intentional wrongdoing." Id. (citations and
17 editing and quotation marks omitted).

18 In a subsequent case, Metropolitan Life Insurance Company v.
19 Noble Lowndes International, Inc., the high court considered a
20 limiting clause that restricted consequential damages to those
21 resulting from "intentional misrepresentations, . . . willful acts
22 or gross negligence." 84 N.Y.2d 430, 433 (1994). The court
23 interpreted the clause to mean that "the parties intended to
24 narrowly exclude from protection truly culpable, harmful conduct,
25 not merely intentional nonperformance of the Agreement motivated by
26 financial self-interest." Id. at 438. The court then explained,

27 As thus defined, limiting defendant's liability for
28 consequential damages to injuries to plaintiff caused by
intentional misrepresentations, willful acts and gross

negligence does not offend public policy. As we said in Sommer v. Federal Signal Corp., the conduct necessary "to pierce an agreed-upon limitation of liability in a commercial contract, must smack[] of intentional wrongdoing." . . . see also, 5 Corbin, Contracts § 1068, at 389 [contractual exemption from liability for tortious conduct may be held against the public interest and illegal]; Restatement [Second] of Contracts § 195[1] ["A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"]).

Id. at 438.

Here, there is sufficient evidence to support an inference that Abbott's action smacked of intentional wrongdoing. Internal documents suggest that Abbott intended to injure GSK's right to co-market Lexiva with Norvir. Further, several documents suggest that Abbott intended to recapture and maintain Kaletra's market share, at the expense of Lexiva and other boosted PIs. GSK presents evidence that, while Abbott was negotiating with it regarding the terms of the license, it was concurrently investigating methods by which it could diminish the license's value. Abbott never informed GSK that it was considering withdrawing or raising dramatically the price of Norvir, two material facts that Abbott knew would have altered the nature of the negotiations. See Stockinger Decl., Ex. 1 at 134:22-24 (Tyree stated that it is "inconsistent to think about withdrawing a product that we're actually issuing licenses on"). Abbott announced the price hike on December 3, 2003, apparently adopting a staff recommendation to implement the increase at the same time as GSK's late-November launch of Lexiva. Abbott adopted this timing as a "clever creative way to make them look bad." Stockinger Decl., Ex. 21 at RIT0437394. Finally, the price hike caused the cost of GSK's Lexiva-based therapy to jump approximately seventy-one percent. This evidence, and the

1 reasonable inferences that can be drawn from it, create a triable
2 issue as to whether Abbott meets the standard set in Sommer.

3 Accordingly, GSK may recover lost profit damages based on
4 Abbott's conduct, if it proves that Abbott acted with reckless
5 indifference to its right to co-market its products with Norvir.

6 b. Restitutionary Damages

7 Abbott contends that one form of consideration for which GSK
8 seeks restitution on its breach of the implied covenant claim was
9 the subject of a separate contract and, as a result, cannot be
10 recovered for a breach of the covenant with respect to the Norvir
11 license.⁹

12 In relevant part, the parties' Norvir license provides that
13 "the terms and conditions of this Agreement and [the parties' other
14 contract] shall remain independent of one another, including the
15 termination provisions." Calamari Decl., Ex. 23 ¶ 7.1. GSK's
16 theory of recovery, however, does not implicate the terms and
17 conditions of this other contract. Accordingly, Abbott's motion on
18 this point is denied.

19 B. Violation of North Carolina's Unfair and Deceptive Trade
20 Practices Act

21 Abbott seeks summary judgment on GSK's claim for violation of
22 North Carolina's UDTPA to the extent that it is based on GSK's
23 allegations that Abbott breached the implied covenant of good faith
24 and fair dealing and deceived consumers through statements it made
25 regarding the Norvir price increase. Abbott does not seek summary

26 ⁹ Abbott does not appear to contest that GSK could recover
27 monies it paid under the terms of the Norvir license. Abbott
28 appears to seek only summary adjudication that GSK cannot recover
the other, more substantial, form of consideration.

1 judgment on GSK's claim for monopolization or attempted
2 monopolization of "any part of trade or commerce in the State of
3 North Carolina," in violation of the UDTPA. N.C. Gen. Stat. § 75-
4 2.1.¹⁰

5 To prove a violation of the UDTPA, a plaintiff must show:
6 "(1) an unfair or deceptive act or practice, or unfair method of
7 competition, (2) in or affecting commerce, and (3) which
8 proximately caused actual injury to the plaintiff or his business."
9 Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 301 (1993).

10 "The question of what constitutes an unfair or deceptive trade
11 practice is an issue of law." Nelson v. Hartford Underwriters Ins.
12 Co., 177 N.C. App. 595, 609 (2006). "A practice is unfair when it
13 offends established public policy as well as when the practice is
14 immoral, unethical, oppressive, unscrupulous, or substantially
15 injurious to consumers." Marshall v. Miller, 302 N.C. 539, 548
16 (1981). "Stated another way, a party is guilty of an unfair act or
17 practice when it engages in conduct which amounts to an inequitable
18 assertion of its power or position." Carcano v. JBSS, LLC, 684
19 S.E.2d 41, 50 (N.C. App. 2009) (citation and internal quotation
20 marks omitted). When determining whether an act violates the
21 UDTPA, courts must consider "the effect of the actor's conduct on
22 the consuming public." Marshall, 302 N.C. at 548.

23 "A simple breach of contract, even if intentional, does not
24 amount to a violation of the Act; a plaintiff must show substantial

25
26 ¹⁰ The parties do not dispute that Abbott would face liability
27 under the UDTPA for monopolization and attempted monopolization if
and only if GSK prevailed on its Section 2 claim. See generally
S.B. 843, 1996 Gen. Assemb., Reg. Sess. (N.C. 1996) (indicating
28 that § 75-2.1 was intended to ensure UDTPA is consistent with
federal antitrust laws).

1 aggravating circumstances attending the breach to recover under the
2 Act, which allows for treble damages." Bartolomeo v. S.B. Thomas,
3 Inc., 889 F.2d 530, 535 (4th Cir. 1989); accord Bob Timberlake
4 Collection, Inc. v. Edwards, 176 N.C. App. 33, 42 (2006).

5 The evidence supporting an award of consequential damages for
6 GSK's breach of the implied covenant claim under New York law could
7 also support liability under the UDTPA based on Abbott's alleged
8 breach. As noted above, the price hike caused the cost of a
9 Lexiva-based therapy to increase seventy-one percent overnight.
10 There is evidence to suggest that this increase was specifically
11 intended to interfere with GSK's launch of Lexiva. Further, the
12 price hike resulted in a sudden and substantial increase in the
13 cost to HIV patients in need of treatment.

14 There are few guides regarding what constitutes sufficiently
15 egregious conduct under the UDTPA. On the one hand, allegations of
16 "deceptions, lies, and misrepresentations" with respect to
17 marketing "membership in a fictional LLC," even if proved, "do not
18 constitute unfair and deceptive practices" under the UDTPA. See
19 Carcano, 684 S.E.2d at 50. On the other hand, a party that never
20 had an intent to fulfill an agreement may be liable under the
21 UDTPA. Unifour Constr. Servs., Inc. v. BellSouth Telecommc'ns,
22 Inc., 163 N.C. App. 657, 667 (2004).

23 Here, although there is no indication that Abbott did not
24 intend to fulfill the explicit terms of the license, there is
25 evidence that Abbott knew that it was taking steps that would
26 undermine the license's value. If the evidence is construed as
27 described above, Abbott's conduct could be found "unethical,
28 oppressive, unscrupulous" and "substantially injurious to

1 consumers." Thus, summary judgment is not warranted on GSK's UDTPA
2 claim to the extent it is based on Abbott's alleged breach of the
3 implied covenant of good faith and fair dealing.

4 Summary judgment, however, is warranted on GSK's UDPTA claim
5 to the extent it is based on Abbott's allegedly deceptive
6 representations to the public about the Norvir price increase.
7 Although Abbott's statements to the public may have been deceptive,
8 GSK does not offer any evidence that it suffered proximate injury
9 from them.

10 Accordingly, the Court summarily adjudicates that GSK cannot
11 base its UDTPA claim on Abbott's alleged deception of consumers.
12 In all other respects, Abbott's motion concerning GSK's UDTPA claim
13 is denied.

14 CONCLUSION

15 For the foregoing reasons, Abbott's motions for summary
16 judgment on the Direct Purchasers' claims (C 07-5470 CW, Docket No.
17 232; C 07-5985 CW, Docket No. 332; C 07-6120 CW, Docket No. 213;
18 C 07-5702 CW, Docket No. 287) and GSK's claims (C 07-5470 CW,
19 Docket No. 227; C 07-5985, Docket No. 328; C 07-6120 CW, Docket No.
20 209; C 07-5702 CW, Docket No. 283) are GRANTED in part and DENIED
21 in part. The Court makes the following rulings:

22 1. Plaintiffs' Section 2 claims for the monopolization and
23 attempted monopolization of the boosted market may go
24 forward on the theories that Abbott engaged in predatory
25 pricing under Cascade and violated its antitrust duty to
26 deal. These claims, however, may not be based on a
27 "monopoly leveraging plus" theory or on a theory that
28 Abbott committed a Conwood-type business tort.

- 1 2. Summary judgment is granted in favor of Abbott on Direct
- 2 Purchasers' Section 2 claim for monopolization of the
- 3 boosting market.
- 4 3. Summary judgment is denied with respect to GSK's claim
- 5 under New York law for the breach of the implied covenant
- 6 of good faith and fair dealing. GSK may seek
- 7 consequential damages and restitution based on this
- 8 claim.
- 9 4. Summary judgment is denied with respect to GSK's UDTPA
- 10 claim. However, the Court summarily adjudicates that the
- 11 claim may not be based on a theory that Abbott deceived
- 12 consumers through its statements regarding the Norvir
- 13 price increase.

14 A final pretrial conference is scheduled for February 8, 2011
15 at 2:00 p.m. A fifteen-day jury trial is set to begin on February
16 28, 2011 at 8:30 a.m.

17 IT IS SO ORDERED.

18 Dated: January 14, 2011



19 CLAUDIA WILKEN
20 United States District Judge

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